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No. 88-348

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a federal court should abstain from adjudicating a claim that relates to an intrastate retail ratemaking currently under review in the state courts.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
THE COURTS BELOW PROPERLY ABSTAINED IN THIS CASE	6
I. *YOUNGER* ABSTENTION IS PROPER IN THIS CASE	7
A. The *Younger* Prerequisites Have Been Met In This Case	8
B. The Exceptions To *Younger* Abstention Do Not Apply	11
C. The Court Should Not Create A Special Exception To *Younger* For Preemption Claims..	16
D. The Solicitor General's Arguments Do Not Justify A Refusal To Abstain Under *Younger*	19
II. *BURFORD* ABSTENTION IS PROPER IN THIS CASE	22
III. THE COURTS BELOW SHOULD NOT SUBSTITUTE THEIR JUDGMENT FOR THAT OF THE STATE COURTS IN DETERMINING THE AVAILABILITY OF PRELIMINARY RELIEF	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES: Page

Abney v. United States, 431 U.S. 651 (1977) 17
Alabama Public Service Comm'n v. Southern Ry. Co., 341 U.S. 341 (1951) ..... *passim*
Aluminum Co. of America v. Utilities Comm'n, 713 F.2d 1024 (4th Cir. 1983), cert. denied, 465 U.S. 1052 (1984) 24
American Trucking Ass'n v. Gray, 108 S.Ct. 2 (1987) 29
Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n, 461 U.S. 375 (1983) 3, 9-10, 10
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 10
Babbitt v. United Farm Workers, 442 U.S. 289 (1979) 28
Burford v. Sun Oil Co., 319 U.S. 315 (1943) ..... *passim*
Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) 10, 24
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 22, 23
Connecticut Light & Power Co. v. Federal Power Comm'n, 324 U.S. 515 (1945) 10, 27
Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980) 10
County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959) 7
Deakins v. Monaghan, 108 S.Ct. 523 (1988) 21
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 5, 28
Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944) 10
Federal Power Comm'n v. Sierra Pacific Power Co., 350 U.S. 348 (1956) 10
Frost v. Corporation Comm'n, 278 U.S. 515 (1929) 10
Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 8
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) ..... *passim*
Interstate Natural Gas Co. v. Federal Power Comm'n, 331 U.S. 682 (1947) 10, 27

TABLE OF AUTHORITIES—Continued

Page

Juidice v. Vail, 430 U.S. 327 (1977) 7, 9, 20, 22, 29
Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972) 18
Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957) 28
McNeese v. Board of Education, 373 U.S. 668 (1963) 26
Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) 7, 8, 10, 20
Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 108 S.Ct. 2428 (1988) ..... *passim*
Moore v. Sims, 442 U.S. 415 (1979) 7, 11, 16-17, 22
Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) 8, 14, 15, 17
NOPSI v. City of New Orleans, 798 F.2d 858 (5th Cir. 1986), cert. denied, 481 U.S. 1023 (1987) 24
Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977) 4, 12
Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) ..... *passim*
Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190 (1983) 11
Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987) 6, 9, 21, 22
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 28
Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952) 21
Public Utilities Comm'n v. United Fuel Gas Co., 317 U.S. 456 (1943) 26
Public Utilities Comm'n v. United States, 355 U.S. 534 (1958) 26-27
Samuels v. Mackell, 401 U.S. 66 (1971) 5, 21
Trainor v. Hernandez, 431 U.S. 434 (1977) 11
Younger v. Harris, 401 U.S. 37 (1971) ..... *passim*
Zwickler v. Koota, 389 U.S. 241 (1967) 22

TABLE OF AUTHORITIES—Continued

	Page
CONSTITUTIONAL PROVISIONS:	
Supremacy Clause, U.S. Const., Art. VI, cl. 2	18
La. Const. Art. 4, § 21(C) (West 1977)	25
STATUTES:	
28 U.S.C. § 2283	28
42 U.S.C. § 1983	18, 26
Act of June 27, 1988, Pub. L. No. 100-532	
§ 1, 102 Stat. 662	20
§ 7, 102 Stat. 664	20
La. Rev. Stat. Ann. ch. 45, § 1192 (West 1982)	25
BOOKS & TREATISES:	
P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts & the Federal System* (3d ed. 1988)	12, 23
Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. Rev. 543 (1985)	6, 21
C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* (1988)	17, 25

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INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling and continuing interest in the issue presented here: whether the jurisdiction of the federal courts may be invoked to pretermit state regulatory processes.

This case follows upon a proceeding before the Federal Energy Regulatory Commission (FERC) to allocate power produced by the Grand Gulf I nuclear facility among the members of the Middle South Utilities, Inc. (MSU) system, one of which is petitioner. See *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S.Ct. 2428

(1988). Following FERC's determination, respondent initiated a review to set petitioner's intrastate retail rates. During the course of that review, respondent (the Council of the City of New Orleans) expressly disavowed any intention of challenging the prudence of petitioner's decision to participate in the Grand Gulf project, and fully accepted both the interstate rates set and the allocation of Grand Gulf power made by FERC. Respondent found, however, that petitioner's management had been imprudent in 1979-1980 when it failed to diversify its risks by selling a portion of its Grand Gulf I power off-system. Respondent accordingly concluded that petitioner should not be permitted to pass on certain Grand Gulf costs to retail customers. Petitioner challenges this determination as inconsistent with FERC's order and with this Court's decision in *Mississippi Power*.

Petitioner had an opportunity to raise its preemption claim before respondent, which in fact closely considered the preemption issue and limited its order in light of the FERC opinion. Petitioner also may litigate its preemption arguments before the Louisiana courts as part of the regular process of administrative review; indeed, there are now three proceedings related to respondent's order pending in the state courts. Petitioner nevertheless brought this action in federal district court, seeking a preliminary injunction against respondent's rate order and a resolution of the preemption claims. The district court and the court of appeals instead abstained, holding that review of respondent's action should proceed in the state courts. Petitioner then brought the case to this Court.

Amici and their members have a significant practical interest in the abstention rules that the Court will address in this case. Retail ratemaking for electric utilities is a matter of profound concern to States, local governments, and all of their citizens. And the setting of rates is a matter that requires both administrative expertise and a familiarity with local conditions. Allowing federal courts to insert themselves into ongoing rate proceedings would disturb that delicate process. It also would cast aspersions on the competence of state courts to adjudicate federal issues. For these reasons, *amici* submit this brief to assist the Court in the resolution of this case.[1]

SUMMARY OF ARGUMENT

1. Under *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, federal courts should decline jurisdiction when they are asked to take action that will interfere with "[1] state administrative proceedings in which [2] important state interests are vindicated, so long as [3] in the course of those proceedings the federal plaintiff could have a full and fair opportunity to litigate his constitutional claim." *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627 (1986). When these factors are present, abstention is "'the *normal* thing to do.'" *Ibid.* (emphasis in original) (quoting *Younger*, 401 U.S. at 45). Petitioner does not deny that the first and third of these prerequisites are present here. And the second plainly is as well. Protecting the integrity of the processes of administrative review is itself an important state concern. At the same time, the underlying state interest in the regulation of utilities, which "is one of the most important of the functions traditionally associated with the police power of the States" (*Arkansas Electric Cooperative Corp. v. Alabama Public Service Comm'n*, 461 U.S. 375, 377 (1983)), is plainly substantial enough to warrant abstention.

Petitioner nevertheless argues that the courts below should not have abstained because respondent's order is assertedly inconsistent with this Court's decision in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S.Ct. 2428 (1988). But federal courts should not forgo abstention and pretermit state court litigation sim-

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[1] The parties have consented to the filing of this brief pursuant to Rule 36 of the Rules of this Court. Their letters of consent have been filed with the Clerk of the Court.

ply because a state agency or trial court makes what is asserted to be a plain error of federal law; such a result would in equal parts disrupt and insult the state adjudicative process, while denying "the State an opportunity to 'set its own house in order.'" *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-480 (1977). In any event, petitioner grossly overstates its case in asserting that respondent's order is inconsistent with *Mississippi Power*. In its decision there, the Court held only that States may not challenge FERC-ordered allocations of Grand Gulf power. But respondent here fully accepted petitioner's obligation to purchase its FERC-allocated share of power from Grand Gulf; respondent concluded that petitioner was imprudent in failing to diversify its risks by selling a portion of the Grand Gulf power *off-system*. The propriety of such an order is simply not addressed in *Mississippi Power*, and it should not be addressed in the first instance during the course of a federal court's abstention analysis.

Petitioner is equally incorrect in asserting that abstention always is inappropriate when the federal claim is one of preemption. If respondent erred in its interpretation of the Federal Power Act, that mistake, like any other error of federal constitutional or statutory law, may be remedied on appeal to the state courts. Surely state judges will be no less willing to enforce federal statutory than federal constitutional claims (as to which abstention plainly is appropriate), and surely the federal Government's interest in the effectuation of constitutional rights is no weaker than its interest in the vindication of statutorily created programmatic concerns.

For his part, the Solicitor General offers a series of arguments that cannot bear substantial weight. This is not an "interstate dispute," as the Solicitor General suggests; respondent's proceeding, which did not disturb FERC's allocation of Grand Gulf power within the MSU system,

concerned only intrastate retail rates, a matter that has no conceivable bearing on the interests of other States. It is irrelevant that this case involves a request for declaratory rather than injunctive relief, since "the declaratory relief alone has practically the same practical impact as a formal injunction would." *Samuels v. Mackell*, 401 U.S. 66, 72 (1971). And the nature of the suit that petitioner filed in state court has no bearing on the abstention question: a necessary concomitant of *Younger* is that a party must exhaust its state appellate remedies before seeking relief in federal court. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609 (1975).

2. *Burford* abstention is proper when the exercise of the district court's jurisdiction would disrupt an ongoing state administrative proceeding; there need not be an unsettled issue of state law in the case. *Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U.S. 341 (1951). This case falls squarely within that rule. Almost by definition, intervention by the federal courts at this stage of the proceeding would disrupt the administrative process by precluding state court consideration of the regulatory issues. And choosing among rate structures is a matter of paramount local concern that demands the application of local administrative expertise.

3. Finally, petitioner and the Solicitor General are incorrect in arguing that, even if abstention is otherwise appropriate, the district court should have determined the availability of preliminary injunctive relief. That argument was at least implicitly rejected in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). And it is inconsistent with the principles of *Younger* and *Burford*. Those doctrines presume that state courts are willing and able to enforce federal rights; if state courts are trusted to resolve federal claims for all time by issuing final judgments on the merits, surely they may be trusted to decide questions of interim relief.

ARGUMENT

THE COURTS BELOW PROPERLY ABSTAINED IN THIS CASE

Petitioner and the Solicitor General suggest that the courts below did something extraordinary, observing that abstention is unusual and that federal courts generally hear the cases that fall within their jurisdiction. There is something to this, of course: in the vast universe of cases, the ones in which abstention is proper are comparatively rare.[2] But when the prerequisites for abstention are present—in particular, when the federal court is asked to interfere with ongoing state judicial or administrative proceedings—there are "strong policies counseling against the exercise of [federal] jurisdiction" that make abstention "'the *normal* thing to do.'" *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 626, 627 (1986) (emphasis in original) (quoting *Younger v. Harris*, 401 U.S. 37, 45 (1971)). This is such a case.

The decisions below rest on two forms of abstention that, like abstention doctrines generally, "reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11 n.9 (1987). *Younger* abstention, in Justice Black's famous words, is grounded on "'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger*, 401 U.S. at 44. The *Younger* doctrine thus reflects the Court's conclusion that federal interference with state

[2] But it is not, perhaps, as rare as petitioner and the Solicitor General suggest. See generally Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L.Rev. 543 (1985).

proceedings "not only 'unduly interfere[s] with the legitimate activities of the Stat[e],' *Younger*, [401 U.S.] at 44, but also 'can readily be interpreted "as reflecting negatively upon the state court's ability to enforce constitutional principles."'" *Juidice v. Vail*, 430 U.S. 327, 336 (1977) (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)). *Burford* abstention, first articulated in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), is based on similar "grounds of comity with the States when the exercise of jurisdiction by the federal court would disrupt a state administrative process." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959). The decisions below are entirely unexceptional applications of both doctrines.

I. *YOUNGER* ABSTENTION IS PROPER IN THIS CASE

The prerequisites to *Younger* abstention have become familiar. Under *Younger* and its progeny, federal courts should decline jurisdiction when they are asked to take action that will interfere with "[1] state administrative proceedings in which [2] important state interests are vindicated, so long as [3] in the course of those proceedings the federal plaintiff could have a full and fair opportunity to litigate his constitutional claim." *Dayton Christian Schools*, 477 U.S. at 627. See *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). If these three elements are present, a federal court may decline to abstain only if the case involves a challenge to a statute that "is flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it" (*Moore v. Sims*, 442 U.S. 415, 424 (1979) (citations and internal quotation marks omitted)), if state enforcement authorities are acting in bad faith, or in other undefined "extraordinary" circumstances. See *id.* at 433; *Juidice*, 430 U.S. at 338-339. We address these elements of the *Younger* test in turn.

A. The *Younger* Prerequisites Have Been Met In This Case

1. Neither petitioner nor the Solicitor General denies that the first and third of the *Younger* prerequisites are present here. Nor could they. While the *Younger* doctrine was developed to preclude interference with state courts, the Court has made it clear that *Younger*'s principles also apply to state administrative proceedings that have a judicial aspect. See *Dayton Christian Schools*, 477 U.S. at 627; *Middlesex County Ethics Comm.*, 457 U.S. at 432. Both courts below properly held that the proceedings before respondent, with review in the state courts, were judicial in nature. See Pet. App. 20A, 28A n.8.[3] In any event, there currently are three suits involving respondent's order—including petitioner's own challenge—pending in state court. By the same token, petitioner will have ample opportunity to litigate its preemption claim during the course of those judicial proceedings; claims very similar to petitioner's are routinely resolved by state courts. See *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 964-966 (1986). Indeed, petitioner had an opportunity to raise its federal arguments in the administrative proceedings, where respondent carefully considered the preemption question and tailored its order to avoid inconsistency with FERC's decision. See J.A. 23-24, 52-61.

2. Petitioner does maintain (Br. 28-32) that respondent is unable to establish the second *Younger* prerequisite: the presence of an "important" state interest. In petitioner's view, the only state interest asserted here is respondent's "adjudicatory interest in having its state

[3] "Of course, if state law expressly indicates that the administrative proceedings are not even 'judicial in nature,' abstention may not be appropriate." *Dayton Christian Schools*, 477 U.S. at 628 n.2, citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). But both courts below—which are familiar with Louisiana law—concluded that "[t]he Council proceeding, followed by the opportunity for state review, * * * constitutes an ongoing judicial proceeding." Pet. App. 20A. See *id.* at 28A n.8.

court resolve federal issues" (Br. 29), which petitioner contrasts with what it describes as a "legitimate substantive state interest" (Br. 30). This contention, in our view, is grounded on a misunderstanding both of the *Younger* doctrine and of respondent's real concerns here.

At the outset, we take issue with petitioner's premise: protecting the integrity of the adjudicatory process—here, the process of state court judicial review of administrative determinations—*is* an important state interest. While the Court has not yet held that *Younger* abstention is necessary *whenever* parallel proceedings are pending in state and federal court (see, *e.g.*, *Pennzoil*, 481 U.S. at 14 n.12), it has indicated that certain adjudicatory interests are themselves "important" within the meaning of *Younger*; abstention is appropriate to forestall federal interference with state judicial proceedings that would "prevent[] the state *not only* from effectuating its substantive policies, but also from continuing to perform the *separate* function of providing a forum competent to vindicate any constitutional objections interposed against those policies." *Huffman*, 420 U.S. at 604 (emphasis added). It is, of course, this consideration that motivated the Court's holdings in *Pennzoil* and *Juidice*, which respectively held abstention appropriate in actions to enjoin execution of a state civil judgment and a judgment of contempt. See 418 U.S. at 12-13; 430 U.S. at 335-336. To the State, using its own courts for the review of administrative decisions is an equally important adjudicatory concern—one important enough, as we explain below (at 22-23), to serve as the principal justification for *Burford* abstention.

In any event, petitioner entirely disregards the existence of a central, substantive state concern in this case: respondent's interest in establishing fair and reasonable rates for the consumers of electric power. The Court itself recently observed that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States" (*Arkansas Elec-*

tric Cooperative Corp. v. Arkansas Public Service Comm'n, 461 U.S. 375, 377 (1983); "[t]he State's concern that rates be fair and efficient represents a clear and substantial governmental interest." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 569 (1980). Cf. *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 549-550 (1980) (Blackmun, J., dissenting); *Frost v. Corporation Comm'n*, 278 U.S. 515, 534-535 (1929) (Brandeis, J., dissenting). For its part, Congress has recognized the importance of these concerns, showing in the Federal Power and Natural Gas Acts a "constant purpose to protect rather than to supervise authority of the states." *Connecticut Light & Power Co. v. Federal Power Comm'n*, 324 U.S. 515, 525 (1945).[4] See *Interstate Natural Gas Co. v. Federal Power Comm'n*, 331 U.S. 682, 690 (1947); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 612 (1944). See also *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S.Ct. 2428, 2447, 2449 (1988) (Brennan, J., dissenting). Indeed, Congress enacted those statutes not to deprive States of ratemaking authority but to close the regulatory gap created by this Court's holdings that the Commerce Clause prohibited the States from regulating the interstate sale of power. See *Arkansas Electric*, 461 U.S. at 377-380; *Connecticut Power*, 324 U.S. at 526-527.

By any measure, the regulation of utilities ranks in importance with the other substantive interests that the Court's decisions have established as "vital" within the meaning of *Younger*: regulation of attorneys (*Middlesex County Ethics Comm. v. Garden State Bar Ass'n, supra*); restriction of pornographic theaters (*Huffman v. Pursue, Ltd., supra*); elimination of sex discrimination (*Ohio Civil Rights Comm'n v. Dayton Christian Schools, supra*); pre-

[4] The Court has interpreted the Federal Power and Natural Gas Acts as "'in all material respects identical.'" *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (quoting *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956)).

vention of child abuse (*Moore v. Sims, supra*); and other "important state policies such as safeguarding the fiscal integrity of [public assistance] programs." *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977); see *id.* at 448 (Blackmun, J., concurring). Ratemaking is a traditional state function; the "economic aspects of electrical generation have been regulated for many years and in great detail by the States." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 206 (1983) (footnote omitted).[5] And that regulation has a far more profound effect on the lives of a far greater number of people than, for example, the disciplining of attorneys or the regulation of obscenity. Indeed, in this case respondent heard testimony that the rate increase sought by petitioner would have led to the elimination of thousands of jobs and the impoverishment of thousands of families in New Orleans. J.A. 21 & n.2. These concerns are plainly important enough to satisfy the second *Younger* prerequisite.

B. The Exceptions To *Younger* Abstention Do Not Apply

1. Finding that federal involvement would disrupt important state proceedings normally would be the end of the *Younger* inquiry. But petitioner asserts (Br. 35-38) that abstention is improper here because respondent's order is inconsistent with this Court's decision in *Mississippi Power*. That asserted inconsistency, petitioner maintains, brings into play the *Younger* exception for challenges to "flagrantly and patently" unconstitutional statutes (Br. 35 n.41). Underlying this argument is petitioner's contention that *Younger* abstention is inappropriate when a federal court is asked to determine that "a state proceeding or order * * * is invalid on its face" (Br. 35). Again, however, we take issue both with pe-

[5] Many States had created commissions to regulate electric utilities as early as 1920, and every State now has such a regulatory body. *Pacific Gas & Electric*, 461 U.S. at 206 n.17. With the exception of a brief interlude, respondent has regulated petitioner since 1922. Pet. App. 22A.

titioner's legal premise and with its application of that premise to the record here.

First, in our view, the *Younger* exception is not applicable when federal court intervention is sought because a state administrative order or trial court decision, rather than a statute, is said to be "patently unconstitutional." If federal courts are not required to abstain in such circumstances, they could pretermit state lawsuits whenever a state agency or trial court made what was purported to be a plain error of federal law, a result that would be extraordinarily disruptive of the State's adjudicative process. That result also would be singularly inappropriate because it typically is "a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions." *Huffman*, 420 U.S. at 609. And it would fly in the face of *Younger's* principal aim: giving "the State an opportunity to 'set its own house in order' when the federal issue is already before a state tribunal." *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-480 (1977).

Indeed, if it is true that respondent's order is plainly inconsistent with federal law (a point we discuss below), federal intervention is unnecessary; the more patently incorrect the administrative decision, the likelier it is that the state courts will detect and correct the illegality.[6] Petitioner's rule, moreover, would require the federal courts to resolve the merits of claims that are ongoing in state court before deciding to abstain, a wasteful and duplicative process that is illustrated by the heated arguments exchanged by the parties here about the merits of respondent's decision.[7]

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[6] Cf. P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 1403 (3d ed. 1988) ("Isn't it a particular insult to the state courts to suggest that they will be unable to detect patent unconstitutionality in state statutes?").

[7] As the court of appeals explained, "[w]hen a federal court decides to abstain, it does not decide to keep federal hands off only so long as the state agency behaves as the court thinks proper. Instead, it decides not to interfere at all, leaving to the state agency, the state courts, and, ultimately, the United States Supreme Court, the interpretation of both state and federal law and the ultimate protection of the federal constitution." Pet. App. 18A-19A.

2. Having said this, we feel bound to accept petitioner's invitation to discuss the substance of the preemption claim: we think it clear that petitioner's submission on the merits is grossly overstated, and that it is at worst an open question whether respondent's order is preempted by FERC's determinations in the Grand Gulf proceeding. In *Mississippi Power*, upon which petitioner principally relies, the Court concluded that FERC had implicitly settled the propriety both of the decision to construct Grand Gulf I and of the agreements between participants in the Middle South Utilities, Inc. (MSU) system. See 108 S.Ct. at 2434-2435, 2441. The Court therefore held that a state utility commission could not reconsider the prudence of the system-wide agreements, of the FERC-ordered allocations of Grand Gulf power, or of a utility's decision to be a party to the construction and operation of Grand Gulf I. See *id.* at 2441.

Because the state court in *Mississippi Power* had ordered a state commission to consider the prudence of the decision to construct Grand Gulf I (see *id.* at 2347) and therefore sought "to permit the State to set rates based on an assumption that [the utility] is obligated to purchase less Grand Gulf power than FERC has ordered it to purchase" (*id.* at 2439), the Court held that the state ruling was inconsistent with FERC's order. See *id.* at 2440. "[I]t obviously cannot be unreasonable," the Court held, "for [the utility] to procure the particular quantity of high-priced Grand Gulf power that FERC has ordered it to pay for." *Ibid.* At the same time, however, the Court recognized that it might be unreasonable for a utility to obtain high-cost power—even at a FERC-approved rate—if the utility were able to obtain substi-

tute low-cost power from an alternative source. See *id.* at 2440; *Nantahala*, 476 U.S. at 972. See also *id.* at 967 (wholesale and retail rates may diverge if costs other than those "resulting from the purchase of FERC-regulated power or gas were to decrease").

In this case, respondent challenged neither the allocation of Grand Gulf power to petitioner nor the prudence of the decision to construct Grand Gulf I, the points that this Court's opinion in *Mississippi Power* held to have been resolved by FERC. To the contrary, respondent's Prudence Resolution "expressly stated that '[t]he Council will not seek to invalidate any of the agreements surrounding Grand Gulf I or to order NOPSI to pay MSU a rate other than that approved by the FERC.'" J.A. 54. And respondent's order expressly disclaimed any intention to "adopt a different allocation formula as the basis for retail rates than that adopted by the FERC for wholesale rates," explaining that "such an action would * * * violate the Supremacy Clause." J.A. 58. Indeed, while respondent in fact held the view that petitioner's commitment to Grand Gulf I was imprudent, it explained that, "[b]ecause of the FERC's determination, which legally established NOPSI's share of Grand Gulf I, we do not * * * alter or interfere with that allocation or base any monetary remedy on the foregoing finding of imprudence." J.A. 23.

Instead, respondent concluded that petitioner's management, had it been prudent, would have recognized in 1979-1980 the difficulties and potential expense associated with the production nuclear plants, and "sought to limit its risk by selling all or part of its share off-system. * * * NOPSI could then have purchased less expensive coal-fired capacity to meet its future needs." J.A. 25. Respondent reasoned that "NOPSI could have stood by its commitment to take and pay for Grand Gulf I power as required by the System and ultimately determined by the FERC, but should have reduced its risks by making power sales of that portion of its commitment which

exceeded a 9 percent share of Grand Gulf."[8] Respondent emphasized that the resulting reduction in costs would follow "from an offset to such costs and not from a rejection of the FERC's allocation of them." *Id.* at 25. See Pet. App. 8A-9A, 24A.

Because respondent's decision (unlike the order of the Mississippi Supreme Court at issue in *Mississippi Power*) questions the prudence neither of the allocation of Grand Gulf power within the MSU system nor of the wholesale rate set by FERC, the *Mississippi Power* decision is not plainly dispositive.[9] Indeed, had respondent found that petitioner were *now* in fact able to sell expensive Grand Gulf power off-system and replace it with cheaper power obtained elsewhere, it plainly would have been consistent with *Mississippi Power* and *Nantahala* for respondent to have held that a failure to do so was imprudent. While it may no longer be possible for petitioner to engage in

[8] Petitioner (Br. 14, 37) and the Solicitor General (Br. 18 n.8) take issue with the eight percent disallowance. But the number was not selected randomly. While respondent suggested that petitioner might reasonably have disposed of all of its Grand Gulf power, it was willing to assume, "based on expert testimony in the record," that petitioner could prudently "have retained a portion of Grand Gulf I relative to its comparative size within the MSU system –that is, about 9 percent of the system's Grand Gulf I obligation." J.A. 25. Because petitioner is obligated to accept 17% of Grand Gulf I's output, respondent found the eight percent disallowance appropriate.

[9] Petitioner asserts that it could not have been held imprudent "for failing to avoid its Grand Gulf allocation unless the allocation was itself unreasonable" (Br. 36). But that is not so: the conclusion that petitioner should have cushioned its risk by arranging to sell some Grand Gulf power off-system says nothing about the reasonableness of the allocation between MSU system participants. Petitioner also reads *Mississippi Power* and *Nantahala* for the proposition that States may not base prudence determinations on steps that utilities should have taken to reduce costs in the past (Br. 37 n.43). The cited pages of those opinions, however, indicate only that "States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair." *Mississippi Power*, 108 S.Ct. at 2438. See *Nantahala*, 476 U.S. at 955.

such a transaction, the question here is whether respondent may find petitioner's failure to do so *in 1979-1980*—when it may well have been possible[10]—to have been imprudent. That question is not addressed in *Mississippi Power*. And however the courts ultimately answer it, the answer should not come in an offhand manner during the course of a federal court's abstention analysis.

C. The Court Should Not Create A Special Exception To *Younger* For Preemption Claims

Petitioner also argues for something that amounts to an entirely new exception to *Younger*: it contends that abstention is inappropriate whenever the federal claim is one of preemption (Br. 32-34). Petitioner's reasoning, as we understand it, is that a preemptive federal law would deny jurisdiction over the subject matter to a state administrative tribunal, thus depriving the State of any legitimate interest in conducting the pending proceeding (Br. 32). Any such contention, however, is squarely foreclosed by this Court's precedents. *Dayton Christian Schools*, upon which petitioner relies, is in fact one of the cases in which the Court has "repeatedly rejected the argument that a constitutional attack on state procedures themselves 'automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases.'" 477 U.S. at 628 (quoting *Moore*, 442 U.S. at

[10] Petitioner appears to suggest a finding by "the lower courts" that such a transaction would not have been possible in 1979-1980 (Br. 37). While the district court expressed skepticism on the point, it plainly made no such finding, and in fact noted that petitioner's president had testified in 1980 that petitioner could sell Grand Gulf power off-system (see Pet. App. 30A & n.11); for its part, the court of appeals did not address the factual issue at all. This issue should, of course, be resolved in petitioner's pending state court lawsuit challenging respondent's order as, among other things, based on clearly erroneous findings of fact. Needless to say, the pendency of a state suit involving factual claims that are related to and could obviate the federal issues, particularly constitutional issues like preemption, counsels restraint by the federal courts.

427 n.10). See 17A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4255 at 259 (1988).

In any event, petitioner is incorrect in asserting that respondent lacks either jurisdiction over or an interest in the rate proceedings.[11] The proceeding in this case was initiated to settle intrastate retail rates, a matter that is squarely within respondent's jurisdiction. In the course of that—or any—rate proceeding, respondent was obligated to determine which cost factors had to be disregarded as a matter of federal law. Indeed, as the court of appeals explained, the filed rate doctrine was developed for precisely that reason, "to ensure the supremacy of FERC's orders in state as well as federal proceedings." Pet. App. 14A. If respondent errs in its interpretation of its FERC-imposed obligations, that mistake, like any other error of federal statutory or constitutional law, may be remedied on appeal to the state courts. See *Nantahala*, 476 U.S. at 964-966 (citing cases in which state courts applied the filed rate doctrine to set aside the decisions of state utility commissions).

Abstention thus does not amount to a decision on the merits, as petitioner argues (see Pet. Br. 32), when the federal claim is one of preemption. Petitioner evidently intends to suggest that a federal court may abstain only when the State has an important interest in the proceeding, that the State's interest cannot be important if the preemption claim is valid, and that a decision to abstain therefore necessarily implies a finding that the preemption claim is insubstantial. We note that this analysis hardly serves to distinguish preemption from other fed-

[11] While petitioner puts its argument in terms of jurisdiction, this is not a case like, for example, one involving the Double Jeopardy Clause (compare *Abney v. United States*, 431 U.S. 651 (1977)), where simply subjecting a party to a particular proceeding denies that party its federal rights. Here, respondent has undoubted authority to subject petitioner to a proceeding designed to set intrastate rates. Petitioner's real complaint is with the merits of respondent's rate order.

eral constitutional claims; under petitioner's analysis, the State does not have a legitimate interest in, for example, enforcing nuisance regulations that are asserted to violate the First Amendment (as was alleged in *Huffman*), although abstention nevertheless repeatedly has been held proper in the face of such claims. But petitioner's argument misses a broader point. The State's underlying interest (here, setting retail rates; in *Huffman*, regulating nuisances) remains legitimate and substantial; if petitioner is correct on the merits of its preemption argument, respondent simply made an error in its effectuation of that interest. Indeed, under petitioner's analysis, it is the decision *not* to abstain that requires resolution of the merits, for the State is deprived of its interest in the proceeding only if its action is preempted. A decision *to* abstain does not require any consideration of the merits; the federal court need find only that the federal claim may be presented to a competent state court.

In fact, there is nothing magic in a claim of preemption —which is, of course, a Supremacy Clause claim that is grounded on the asserted inconsistency of state action with a federal statute—that distinguishes such a claim from other constitutional claims for abstention purposes. Cf. *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 510-512 (1972) (*Pullman* abstention warranted in the face of a preemption claim). Surely there is no reason to presume that state judges, who are bound by Article VI of the Constitution to enforce federal statutes, will be less willing to vindicate federal statutory than federal constitutional rights. See generally *Huffman*, 420 U.S. at 611. Surely federal statutory rights are not more "important" in comity terms to the federal Government than are rights created directly by the federal Constitution. And surely the federal interest in the effectuation of federal constitutional rights—an interest that is reflected not only in th Constitution itself but also in Congress's enactment of 42 U.S.C. § 1983—is no weaker than its interest in the vindication of statutorily created

programmatic concerns.[12] A special rule for preemption cases accordingly is unnecessary.

D. The Solicitor General's Arguments Do Not Justify A Refusal To Abstain Under *Younger*

The Solicitor General's *Younger* arguments are noteworthy principally because they fail to overlap at even a single point with petitioner's analysis. While the Solicitor General must get credit for creativity and candor, we believe that his arguments are ultimately inconsistent with this Court's precedents.

The Solicitor General initially contends that the notions of comity underlying *Younger* are due little respect in this case; pointing to petitioner's participation with other utilities in a multi-state common pool, the Solicitor General suggests that "the interests of several states are at odds" in this "inherently interstate dispute" (Br. 21). Despite the Solicitor General's disclaimer (*ibid.*), we note that this analysis makes sense only on the assumption that state courts cannot be trusted to recognize the legitimate interests of sister States, a proposition that surely " 'reflect[s] negatively upon the state court's ability to enforce constitutional principles.' " *Huffman*, 420 U.S. at 604.[13] But however that may be, the short

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[12] The Solicitor General suggests (Br. 22) that certain preemption claims may be unsuitable for resolution by the state courts because they turn on an understanding "of a complex federal regulatory scheme." But even granting the dubious proposition that statutory claims are more difficult than constitutional ones, there is no reason to suppose that the federal courts have an expertise superior to that of the state courts in resolving claims under the Federal Power Act in general and the filed rate doctrine in particular. Indeed, the state courts, which routinely review challenges to the orders of state utility commissions (see page 8, *supra*), may well be the superior fora for the resolution of such claims. The district judge below was himself "confident that Louisiana's state courts are more than competent to handle any federal question presented." Pet. App. 27A.

[13] Indeed, the regulatory interest in *Burford* itself was strikingly similar to that in this case: the rights to oil at issue there were developed by the Texas Railroad Commission "in cooperation with

answer to the Solicitor General's argument is that this is *not* an interstate dispute. Respondent disturbed neither FERC's allocation of Grand Gulf power within the MSU system nor the interstate wholesale rates to be paid by petitioner; respondent's administrative proceeding concerned only intrastate retail rates, and addressed the simple question whether certain of petitioner's costs would be absorbed by petitioner rather than by its instate retail customers. This is a wholly intrastate question that has no conceivable bearing on the interests of other States—a conclusion that is borne out by the failure of any of the purportedly affected States to file in opposition to respondent.[14]

The Solicitor General also suggests that the nature of the proceeding here makes *Younger* abstention inappropriate, noting that petitioner sought declaratory relief rather than an injunction against the pending state ju-

other oil producing States" as part of the Interstate Oil Compact Commission. 319 U.S. at 320-321 & n.12.

[14] The Solicitor General more ambitiously offers a multi-part balancing test from which he derives the conclusion that abstention is improper here because (1) the federal claim would be dispositive of the merits of the lawsuit; (2) there are no unresolved threshold issues of state law; and (3) there are "multi-state interests" in this case (Br. 22-23). But the first and second of these factors were present in many of this Court's decisions under *Younger*. See, *e.g.*, *Dayton Christian Schools*; *Middlesex County Ethics Comm.*; *Juidice*; *Huffman*. And as we explain in text, the third factor, even if relevant, is simply not present in this case. The Solicitor General also notes that parties may no longer appeal to this Court from state courts as a matter of right when state statutes are upheld against constitutional attack (Br. 22 n.15). See Act of June 27, 1988, Pub. L. No. 100-532, §§ 1, 7, 102 Stat. 662, 664. The Court has made it clear, however, that the existence of such a right is not an essential element of *Younger* abstention: "quite apart from appellee's right to appeal [to this Court] had it remained in state court, we conclude that it should not be permitted the luxury of federal litigation of issues presented by ongoing state proceedings, a luxury which, as we have already explained, is quite costly in terms of the interests which *Younger* seeks to protect." *Huffman*, 420 U.S. at 605-606.

dicial proceedings; "[t]he sole impact of the federal court's ruling would be its res judicata effect" which, the Solicitor General states, "is not in itself enough to warrant abstention" (Br. 25). In fact, however, this Court has made it clear that abstention is in order when the party seeking federal relief requests a declaratory judgment, since "the declaratory relief alone has practically the same practical impact as a formal injunction would." *Samuels v. Mackell*, 401 U.S. 66, 72 (1971).[15] See *Deakins v. Monaghan*, 108 S.Ct. 523, 533 (1988) (White, J., concurring). See also Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L.Rev. 543, 582 (1985) (footnote omitted) ("questions of federalism arise in contexts other than a prayer for a federal court injunction against a state proceeding. Such questions are also raised, for example, by the existence of parallel state and noninjunctive federal proceedings").

In a related vein, the Solicitor General suggests that petitioner "should not be deemed to have triggered *Younger* abstention" by filing a suit for review of respondent's order in state court (Br. 26). Whether and when petitioner chose to file its state suit, however—and

[15] " 'Is the declaration contemplated here to be *res judicata*, so that the [state court] cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State [court] before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.' " *Samuels*, 401 U.S. at 72 (quoting *Public Service Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 247 (1952)). The Solicitor General contends (Br. 25) that requiring abstention in cases seeking declaratory relief would make abstention mandatory whenever parallel proceedings are pending in state and federal court. In fact, however—as the Solicitor General implicitly acknowledges (Br. 25 n.20)—the limiting principle adopted by the Court involves not the type of relief sought but the importance of the state interest at issue. See *Pennzoil*, 481 U.S. at 14 n.12. We also note that petitioner did seek to enjoin respondent's order, a request that, if granted, would have pretermitted the state court's consideration of the right to interim relief—an important part of the ongoing state proceeding. Cf. *id.* at 14. See also *Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 349 (1951).

the nature of any other pending suits (see Br. 25-26)[16] —is simply irrelevant here. A party that takes issue with a state trial court (or, as in this case, administrative) determination may not simply decide to forgo the use of state appellate procedures: "a necessary concomitant of *Younger* is that a party in [petitioner's] posture must exhaust his state appellate remedies before seeking relief in the District Court." *Huffman*, 420 U.S. at 608. Petitioner "had available the remedy of appeal" in state court, and that is enough to make *Younger* abstention appropriate. *Id.* at 610. See also *Pennzoil*, 481 U.S. at 14 n.13, 15; *Moore*, 442 U.S. at 425; *Juidice*, 430 U.S. at 337.

II. *BURFORD* ABSTENTION IS PROPER IN THIS CASE

Burford abstention is appropriate "in situations in which the exercise of jurisdiction by a federal court would disrupt a state administrative process." *Zwickler v. Koota*, 389 U.S. 241, 256 (1967) (Harlan, J., concurring in the judgment). See *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976). Petitioner is incorrect in asserting (Br. 22, 23) that the existence of an unsettled issue of state law is a prerequisite to *Burford* abstention; it is interference with state processes of regulation and with the formulation of state regulatory policy that is central.[17] The point was

[16] The Solicitor General suggests (Br. 25-26) that none of the pending state judicial proceedings implicates important state interests. As we explain above, however, ratemaking is a vital state concern, and the State has a compelling interest in seeing its courts perform what the district court described as their function of "assessing and formulating state policy" with regard to utilities (Pet. App. 27A).

[17] Quoting from *Colorado River*, petitioner states that *Burford* abstention is proper only when a case involves difficult questions of state law *and* federal review would disrupt the development of coherent state policy (Br. 22). Quoting virtually identical language from the same opinion, the Solicitor General states that abstention is proper under *Burford* when the case involves difficult questions of state law *or* federal review would disrupt the development of coherent state policy (Br. 16). The Solicitor General's reading of *Colorado River* is correct. See 424 U.S. at 814 (emphasis added) ("*it is enough* that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern").

settled in *Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U.S. 341 (1951), which involved a challenge to a regulatory decision of the state public service commission. This Court acknowledged that there were no unsettled issues of state law in the case (*id.* at 344 & n.5; see P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts & The Federal System* 1365 (3d ed. 1988)), and the only ground on which the order was challenged in federal court was its asserted inconsistency with the Due Process Clause of the federal Constitution. See 341 U.S. at 346-347; 91 F.Supp. 980, 986-987, 995. The Court nevertheless held abstention appropriate "'so as to avoid needless obstruction of the domestic policy of the states'" (341 U.S. at 351 (citation and footnote omitted))—a holding that was vigorously criticized by Justice Frankfurter on the ground that the issues in the case were entirely federal. See 341 U.S. at 355, 359-362 (Frankfurter, J., concurring in the result). Indeed, Justice Frankfurter read *Alabama Public Service Comm'n* as effectively holding that "hereafter no federal court should entertain a suit against any action of a state agency" so long as judicial review is available in the state courts. *Id.* at 362 (Frankfurter, J., concurring in the result).[18]

[18] The Solicitor General suggests (Br. 19) that *Alabama Public Service Comm'n* is inapplicable here because the federal Government had no regulatory role in that case—which involved the regulation of intrastate rail service—comparable to the one played here by FERC. But the authority of the Interstate Commerce Commission under the scheme at issue in *Alabama Public Service Comm'n* was strikingly similar to FERC's authority in administering the Federal Power Act. See 341 U.S. at 345-346. And the authority of the States to regulate intrastate power rates under the Federal Power Act is every bit as great as their authority over intrastate transportation. See page 10, *supra*.

This case falls squarely within the rule of *Alabama Public Service Comm'n*. Almost by definition, federal involvement at this stage of the proceeding would disrupt state administrative processes by precluding consideration of the case by the state courts—which, with respondent, share responsibility for "assessing and formulating state policy" (Pet. App. 27A). Indeed, intrastate ratemaking proceedings present "the quintessential *Burford* setting." *Aluminum Co. of America v. Utilities Comm'n*, 713 F.2d 1024, 1029 (4th Cir. 1983), cert. denied, 465 U.S. 1052 (1984). Choosing "among rate structures involves difficult and important questions of economic supply and distributional fairness" (*Central Hudson*, 447 U.S. at 569); it is difficult to disagree with the court of appeals' recognition at an earlier stage of this proceeding that, "[a]s with the regulatory scheme at issue in *Burford*, the regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise." *NOPSI v. City of New Orleans*, 798 F.2d 858, 862 (5th Cir. 1986), cert. denied, 481 U.S. 1023 (1987).

The Solicitor General suggests (Br. 18-19) that the problem here is not a predominantly local one. But the regulation of intrastate rates, as well as the considerations that dictated respondent's order (the behavior of petitioner's management in 1979-1980 (see J.A. 24-25)), is entirely local in character. The related argument that resolution of the preemption claim will not require the consideration of "'local factors'" (Br. 18 (quoting *Alabama Public Service Comm'n*, 341 U.S. at 349)) assumes that answering the federal question here will be a simple matter of looking within the four corners of FERC's opinion. In fact, however, petitioner's argument on the merits raises a range of difficult questions—whether, for example, a prudence disallowance must be premised on savings that were possible in the marketplace (see, *e.g.*, Pet. App. 31A n.11)—that in turn may require analysis both of the state law on prudence and of the factual record. These questions should be answered by a court

that is sensitive to local concerns.[19] "As adequate state court review of an administrative order based upon predominantly local factors is available to [petitioner], intervention of a federal court is not necessary for the protection of federal rights." *Alabama Public Service Comm'n*, 341 U.S. at 349 (footnote omitted).[20]

In response to these points, petitioner argues principally that this Court "has repeatedly held *Burford* abstention improper" when the challenge to a state regulatory decision "raises only federal claims" (Br. 23). The cases that petitioner cites for this proposition—which is,

[19] The Solicitor General also maintains (Br. 17) that any disruption to state policy from a finding of preemption would follow from the congressional allocation of regulatory power. But this argument confuses the merits with the abstention question. Certainly, if the Council ultimately is found to have exceeded its regulatory authority, that holding will rest on congressional action—just as a ruling against the regulator in *Alabama Public Service Comm'n* would have turned on the meaning of the Due Process Clause. It is the consideration and decision of the issue by a court that is unfamiliar with local considerations that threatens disruption to the state administrative scheme.

[20] Petitioner (Br. 26 n.28) and the Solicitor General (Br. 19 n.10) argue that the state courts here cannot be viewed as part of the regulatory process because review of intrastate rate orders is not concentrated in a single Louisiana court. But whether or not concentrated, the nature of the administrative review here is identical to that characterized as "an integral part of the regulatory process" under state law in *Alabama Public Service Comm'n* (341 U.S. at 348). See 17A C. Wright, A. Miller & E. Cooper, *supra*, § 4244 at 83 (labeling "too narrow" the assertion that *Burford* abstention is proper only when administrative review takes place in a specialized court). In any event, the intensely local nature of the process of review is in fact emphasized by the Louisiana scheme. While orders of the Louisiana Public Service Commission, which regulates most state utilities, are reviewable by a state district court sitting in Baton Rouge (see La. Rev. Stat. Ann. ch. 45, § 1192 (West 1982)), the Commission has no jurisdiction over utilities that, like petitioner, are regulated by the governing authority of a political subdivision. La. Const. art. 4, § 21(C) (West 1977). Review of respondent's rate orders is accordingly conducted by local courts that are, in contrast with courts sitting in Baton Rouge, especially familiar with local conditions.

in any event, inconsistent with *Alabama Public Service Comm'n*—do not support it. The Court's decision in *Public Utilities Comm'n v. United Fuel Gas Co.*, 317 U.S. 456 (1943), upon which petitioner heavily relies (Br. 24), was rendered prior to the reargument and decision in *Burford*, and therefore could hardly have contained even an implicit holding that *Burford* abstention was inapplicable in a challenge to the regulatory proceeding involved.[21] The Court's refusal to abstain in *McNeese v. Board of Education*, 373 U.S. 668 (1963) (cited at Pet. Br. 23), was motivated at least in part by doubts that the state administrative remedy was adequate to effectuate federal rights. See 373 U.S. at 674-676. In addition, *McNeese* involved a claim of racial discrimination brought under 42 U.S.C. § 1983, for which use of a federal forum was deemed particularly appropriate. See 373 U.S. at 671-673. *Public Utilities Comm'n v. United*

[21] Indeed, Justice Black, the author of the Court's opinion in *Burford*, vigorously dissented in *United Fuel* (see 317 U.S. at 470); the author of the Court's opinion in *United Fuel*, Justice Frankfurter, issued a vigorous dissent in *Burford* (see 319 U.S. at 336). Justice Frankfurter offered an equally vigorous separate opinion in *Alabama Public Service Comm'n*, suggesting that the Court there departed from prior practice by ordering abstention in a case that involved only issues of federal law. See 341 U.S. at 355-356, 362 (Frankfurter, J., concurring in the result). This strongly suggests that the limitations on abstention that petitioner draws from *United Fuel*, even if present in the case, are no longer good law. In any event, the preemption claim in *United Fuel* was not, as petitioner maintains (Br. 24), identical to the one in this case. While the investigation there was commenced in the context of a retail ratemaking, it involved the utility commission's *explicit* assertion of jurisdiction over wholesale interstate rates. See 317 U.S. at 458, 461, 465. Here, of course, respondent has made no such assertion. In addition, the Court's decision in *United Fuel* to resolve an issue of local law was motivated in large part by its conclusion that the litigation—which had been commenced in district court in 1935 and not resolved by that court until 1942—"has already been in the federal courts an inordinately long time," so that "considerations of equity require that the litigation be brought to an end as quickly as possible." *Id.* at 463; see *id.* at 460-461 & n.2.

States, 355 U.S. 534 (1958), upon which petitioner also relies (Br. 24), does not discuss *Burford* abstention. In any event, the case involved an action by the United States brought in anticipation of a state enforcement proceeding (see 355 U.S. at 536-539), in a setting in which the state agency might not have entertained the federal claim (see *id.* at 539-540).

Finally, petitioner (Br. 25-26) and the Solicitor General (Br. 17, 18-19) repeat their contentions that abstention is inappropriate in cases where preemption is asserted. Again, we fail to see why state courts should be presumed competent to resolve federal constitutional, but not statutory, claims. In any event, petitioner and the Solicitor General fail to recognize that every preemption claim involves not only a federal interest that is said to have a preemptive effect, but also a state interest that is said to be preempted. That state interest gives the state courts both a familiarity with the issues and a concern for reaching the proper outcome that is every bit as great as that of the federal courts.

The flip sides of the preemption inquiry are plainly visible here. The Federal Power Act was enacted both to grant the federal Government authority to regulate the interstate sale of power and to exclude the federal Government from the regulation of intrastate sales: "it could not be plainer that the statutes at issue were designed to confine the scope of FERC's jurisdiction by prohibiting FERC from regulating matters within the sphere of authority States had to regulate retail utilities under our old Commerce Clause cases." *Mississippi Power*, 108 S.Ct. at 2447 (Brennan, J., dissenting). See generally *Interstate Natural Gas Co.*, 331 U.S. at 690; *Connecticut Light & Power*, 324 U.S. at 525. The state interests are thus manifest in the federal statute itself. In such circumstances, the federal courts should not prevent the state courts from completing the normal administrative process.

III. THE COURTS BELOW SHOULD NOT SUBSTITUTE THEIR JUDGMENT FOR THAT OF THE STATE COURTS IN DETERMINING THE AVAILABILITY OF PRELIMINARY RELIEF

In a final attempt to embroil the federal courts in this dispute, petitioner (Br. 38-39) and the Solicitor General (Br. 27-30) argue that, even if abstention is otherwise appropriate, the district court should have determined the availability of preliminary injunctive relief. But nothing in this Court's decisions supports the creation of such a hybrid action, in which the preliminary litigation would proceed in one forum while the litigation proceeding toward the final judgment on the merits would move forward in another.[22]

To the contrary, the Court's disposition of the federal claims in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), suggests that a special exception to the abstention rules should not be created for preliminary relief. In *Doran*, three operators of bars (Salem, Tim-Rob, and M & L) brought suit in federal court to challenge the constitutionality of a ban on topless dancing, seeking a temporary restraining order, preliminary injunctive relief, and a declaratory judgment. See *id.* at 924-925. Because there were no pending state proceedings involving Salem and Tim-Rob, this Court held that the district court had properly declined to abstain in their actions; the Court went on to affirm the district court's award of preliminary injunctive relief to Salem and Tim-Rob because the bars faced the prospect of irreparable injury in the form of

[22] The decisions cited by petitioner and the Solicitor General stand for no such proposition. *Babbitt v. United Farm Workers*, 442 U.S. 289, 312 n.18 (1979) (cited at Pet. Br. 39 and U.S. Br. 29), and, evidently, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 140 n.3 (1970) (cited at U.S. Br. 29 & n.26), involved a form of *Pullman* abstention; there were, in those cases, no pending state proceedings to which the federal courts could defer. *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957) (cited at U.S. Br. 29), was not an abstention case at all; it involved the interpretation of 28 U.S.C. § 2283 and turned on the special status of the United States as a litigant. See 352 U.S. at 225-226.

"a substantial loss of business and perhaps even bankruptcy." *Id.* at 932. But M & L stood in a different position, having been served with criminal summonses in state court while its federal action was still "in an embryonic stage." Although M & L presumably faced the same irreparable injury as the other operators, the Court held that the pendency of the state proceedings meant that "M & L's prayer for injunction is squarely governed by *Younger*." *Id.* at 929.

This conclusion followed directly from the principles that underlie the *Younger* doctrine. *Younger* presumes that state courts are willing and able to enforce federal rights. And if state courts are permitted to settle the existence of a party's federal rights for all time (subject to review in this Court[23]) by issuing a final judgment on the merits, surely they may be trusted to decide questions of interim relief. Indeed, a federal court's substitution of its judgment for that of a state court about the availability of preliminary relief reflects just as "negatively upon the state court's ability to enforce constitutional principles" (*Juidice*, 430 U.S. at 336 (citations and internal quotation marks omitted)) as would a federal court's decision on the merits. So long as state court procedures make provision for the award of preliminary relief, principles of comity preclude the involvement of federal courts.

The same conclusion is appropriate under *Burford*. In *Alabama Public Service Comm'n* the Court squarely rejected the proposition that a federal court should take jurisdiction "whenever a plaintiff can show irreparable loss caused by an allegedly invalid state administrative order ripe for individual review in the state courts." 341 U.S. at 344-345. The Court therefore held federal inter-

[23] Despite the Solicitor General's hint to the contrary (Br. 28 n.24), interim relief is available from this Court in cases pending in state court when that is necessary to protect federal rights. See, *e.g.*, *American Trucking Ass'n v. Gray*, 108 S.Ct. 2 (1987) (opinion of Blackmun, J.).

vention inappropriate in the absence of a showing that the "state procedure for review of Commission orders is in any way inadequate to preserve for ultimate review in this Court any federal questions arising out of such orders." *Id.* at 349 (footnote omitted). That reasoning is fully applicable here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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